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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 SHEET METAL WORKERS  
11 INTERNATIONAL ASSOCIATION  
12 LOCAL 66, et al.,

13 Plaintiffs,

14 v.

15 NORTHSHORE EXTERIORS, INC.,

16 Defendant.

CASE NO. C19-1261JLR

ORDER DENYING MOTION TO  
DISMISS AND GRANTING  
LEAVE TO AMEND

17 **I. INTRODUCTION**

18 Before the court are two motions: (1) Defendant Northshore Exteriors, Inc.’s  
19 (“Northshore”) Federal Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of  
20 subject matter jurisdiction (MTD (Dkt. # 13); *see also* MTD Reply (Dkt. # 22)), and (2)  
21 Plaintiffs International Association of Sheet Metal, Air, Rail, and Transportation Workers  
22 (“SMART”) and Sheet Metal Workers International Association Local 66’s (“Local 66”) (collectively, “Plaintiffs”) motion for leave to amend the complaint (MTA (Dkt. # 25);

1 *see also* MTA Reply (Dkt. # 29)). Northshore and Plaintiffs filed responses to the  
2 respective motions. (MTD Resp. (Dkt. # 21); MTA Resp. (Dkt. # 26).) The court has  
3 considered the parties’ submissions, the relevant portions of the record, and the  
4 applicable law. Being fully advised, the court DENIES Northshore’s motion to dismiss  
5 and GRANTS Plaintiffs’ motion for leave to amend.<sup>1</sup>

## 6 **II. BACKGROUND**

### 7 **A. Factual Background**

8 Northshore is a sheet metal contractor. (Pet. (Dkt. # 4) at 3 ¶ 6.) The Central  
9 Puget Sound Transit Authority (“Sound Transit”) hired Northshore to perform work on  
10 the E-130 East Link Extension, Bellevue to Seattle project (the “East Link Extension”).  
11 (*See id.* at 3-4 ¶¶ 7, 10.) In order to perform work on the East Link Extension,  
12 Northshore signed a letter of assent to the project-labor agreement governing work on the  
13 East Link Extension—the Sound Transit Project Labor Agreement for the Construction  
14 of Sounder Commuter and Link Light Rail Projects (the “PLA”). (*See id.* at 3 ¶¶ 7, 9.)  
15 Local 66 is also a signatory to the PLA. (*See id.* at 3 ¶ 8.)

16 After Sound Transit hired Northshore to perform work on the East Link Extension,  
17 Northshore assigned the installation of metal roof panels, substrate, water barriers, related  
18 flashings, coping, gutters, and downspouts (the “Work”) to United Brotherhood of  
19 Carpenters (the “Carpenters”). (*See id.* at 4 ¶ 10.) At the time Northshore assigned the  
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21 <sup>1</sup> The parties did not request oral argument on either of the motions (*see* MTD at 1; MTD  
22 Resp. at 1; MTA at 1; MTA Resp. at 1), and the court finds oral argument unnecessary to the  
disposition of the motions, *see* Local Rules W.D. Wash. LCR 7(b)(4).

1 Work to the Carpenters, Northshore and the Carpenters had a collective bargaining  
2 agreement that covered Northshore’s construction work. (Meyer Decl. (Dkt. # 14) ¶ 3.)  
3 The Carpenters are also signatories to the PLA. (Pet. at 3 ¶ 8.)

4 Pursuant to the dispute resolution provisions of the PLA, Local 66 challenged  
5 Northshore’s assignment to the Carpenters on the basis that the Work was within Local  
6 66’s jurisdiction, and, as such, should have been assigned to Local 66. (*See id.* at 4 ¶¶  
7 10-13.) On June 27, 2019, after initial attempts to resolve the jurisdictional dispute  
8 failed, Local 66 submitted a formal request to arbitrate. (*See id.* at 4 ¶ 13.) On July 18,  
9 2019, SMART—Local 66’s parent union—and the Carpenters settled their jurisdictional  
10 dispute and agreed that the Work should be assigned to Local 66. (*See id.* at 3-4 ¶¶ 5, 14;  
11 Meyer Decl. ¶ 7, Ex. 4 at 75.<sup>2</sup>) The settlement agreement stated that the Carpenters were  
12 no longer claiming jurisdiction over the Work and that the Carpenters had asked SMART  
13 to “reach out to the contractor in order to make arrangements to man the project with  
14 SMART members.” (Meyer Decl. ¶ 7, Ex. 4 at 75.) Pursuant to that settlement  
15 agreement, the Plan Administrator issued a directive assigning the Work to Local 66 on  
16 July 19, 2019 (the “Directive”). (*See id.* at 74.) The Directive ordered Northshore to  
17 “assign the work in accordance with the attached [settlement] agreement reached between  
18 the crafts.” (*Id.*)

19 On July 19, 2019—the same date that the Plan Administrator issued the  
20 Directive—Northshore raised several objections to the Directive but ultimately advised

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22 <sup>2</sup> Because Exhibit 4 to the Meyer Declaration is not paginated, the court cites the page  
numbers supplied by its electronic docketing system.

1 the Plan Administrator that it would assign the Work “to [Local 66] consistent with the  
2 terms of the Sound Transit PLA.” (Hem Decl. (Dkt. # 21-1) ¶ 12, Ex. 9.) Accordingly,  
3 on July 24, 2019, Local 66 demanded that Northshore assign the Work to Local 66 by  
4 requesting sheet metal worker dispatches from Local 66’s hiring hall. (*Id.* ¶ 14.) On July  
5 29, 2019, Northshore responded and advised Local 66 that Northshore was aware that the  
6 Work had been awarded to Local 66 and that Northshore “intend[ed] to abide by that  
7 decision for this project.” (*See id.* ¶ 15, Ex. 10.) Northshore stated, however, that while  
8 it would “pay[] into the applicable trust funds,” Northshore did not believe that the  
9 Administrator’s Directive required Northshore to dispatch workers from Local 66’s  
10 hiring hall because certain hiring provisions of the PLA were inapplicable to Northshore  
11 due to Northshore’s collective bargaining agreement with the Carpenters. (*See id.*)

12 Local 66 filed a second grievance against Northshore on July 24, 2019. (Hem  
13 Decl. ¶ 17, Ex. 11.) In that grievance, Local 66 alleges that Northshore’s hiring practices  
14 violate the dispatch procedures of the PLA. (*Id.*)

## 15 **B. Procedural History**

16 Plaintiffs filed a petition to confirm and enforce the Plan Administrator’s Directive  
17 on August 9, 2019. (*See Pet.* at 1.) Plaintiffs’ sole cause of action is a claim to enforce  
18 the Directive pursuant to Section 301 of the Labor Management Relations Act  
19 (“LMRA”), 29 U.S.C. § 185. (*See id.* at 7 ¶¶ 24-27.)

## 20 **III. ANALYSIS**

21 Northshore’s motion to dismiss presents facial and factual challenges to Plaintiffs’  
22 petition. (*See MTD* at 6.) Northshore argues that the court lacks subject matter

jurisdiction over this case because there is no “case or controversy” under Article III of the U.S. Constitution. (*See* MTD at 6.) Northshore claims that the Directive ordered Northshore to assign the Work to Local 66, which Northshore believes it had already done by the time Plaintiffs filed this lawsuit. (*See id.*) Thus, according to Northshore, “[t]here is . . . no dispute about the applicability or propriety of the Directive,” which means the court lacks subject matter jurisdiction over this case. (*See id.*) Plaintiffs respond that the parties’ ongoing dispute over Northshore’s compliance with the Directive establishes a case or controversy. (*See* MTD Resp. at 5.) Further, although Plaintiffs maintain that the operative complaint sufficiently establishes a case or controversy, Plaintiffs also seek leave to amend the petition to add additional facts that demonstrate that a live controversy exists in this case. (*See* MTA at 2.) In response, Northshore claims that the court should deny leave to amend because amendment would be futile. (*See* MTA Resp. at 2.)

**A. Northshore’s Motion to Dismiss**

1. Legal Standards

a. *Rule 12(b)(1)*

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) tests the court’s subject matter jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see also Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (“An objection that a federal court lacks subject matter jurisdiction may be raised at any time.”). “When a motion to dismiss attacks subject matter jurisdiction under Rule 12(b)(1) on the face of the complaint, the court assumes the factual allegations in the

1 complaint are true and draws all reasonable inferences in the plaintiff's favor." *City of*  
2 *L.A. v. JPMorgan Chase & Co.*, 22 F. Supp. 3d 1047, 1052 (C.D. Cal. 2014). A  
3 defendant may also mount a factual challenge, which the court resolves by considering  
4 extrinsic evidence. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). When a  
5 party raises the question of subject matter jurisdiction by factual motion, the plaintiff  
6 bears the burden of establishing the court's jurisdiction by "furnish[ing] affidavits or  
7 other evidence." *Meyer*, 373 F.3d at 1039.

8 *b. Justiciability*

9 The judicial power of the federal courts is limited to "cases" and "controversies."  
10 U.S. Const., Art. III, § 2. A federal court's "role is neither to issue advisory opinions nor  
11 to declare rights in hypothetical cases, but to adjudicate live cases or controversies  
12 consistent with the powers granted the judiciary in Article III of the Constitution."  
13 *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en  
14 banc). If there is no case or controversy within the meaning of those constitutional terms,  
15 then the court lacks subject matter jurisdiction to hear the claim. *See Baker v. Carr*, 369  
16 U.S. 186, 198 (1962).

17 2. Merits

18 The court concludes that Plaintiffs raise a justiciable case or controversy.  
19 Northshore's facial challenge to the petition is baseless. The petition alleges that  
20 Northshore is not complying with the Directive's mandate to assign the Work to Local  
21 66. (*See* Pet. at 2, 6. ¶¶ 2, 19.) Accordingly, Plaintiffs seek a court order enforcing the  
22 Directive and "ordering Northshore to assign work on the East Link Extension to [Local

1 66] consistent with the [D]irective,” (*see id.* at 7 ¶ 1), which Plaintiffs claim they are  
2 entitled to under the terms of the PLA and the LMRA (*see id.* at 6-7 ¶¶ 20-23, 26). Those  
3 factual allegations establish a live controversy over Northshore’s compliance with the  
4 Directive.

5 Northshore’s allegation that the petition somehow “acknowledges” that  
6 Northshore has assigned the Work to Local 66 is perplexing. (*See* MTD at 16.) The  
7 petition quite clearly alleges that “Northshore refused to comply” with the Directive.  
8 (*See* Pet. at 2 ¶ 2.) Northshore obviously disagrees with that allegation, but its dispute  
9 over the veracity of the allegations in the petition cannot sustain a facial challenge to  
10 subject matter jurisdiction. *Meyer*, 373 F.3d at 1039 (“In a facial attack, the challenger  
11 asserts that the allegations contained in a complaint are insufficient on their face to  
12 invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the  
13 truth of the allegations that, by themselves, would otherwise invoke federal  
14 jurisdiction.”).

15 Northshore’s factual challenge to subject matter jurisdiction fares no better. In  
16 response to Northshore’s factual challenge, Plaintiffs submitted evidence that Northshore  
17 has not complied with the Directive. (*See* Hem Decl. ¶¶ 11-16; *id.* ¶ 12, Ex. 9; *id.* ¶ 15,  
18 Ex. 10.) Specifically, Plaintiffs submitted a declaration from Local 66’s business  
19 representative stating that he has demanded that Northshore assign the Work to Local 66  
20 in accordance with the Directive, but Northshore has, “in practical terms, refus[ed] to hire  
21 Local 66 members” by refusing to use the Local 66 hiring hall. (*See id.* at ¶¶ 14-16; *see*  
22 *also id.* at ¶ 12, Ex. 9; *id.* ¶ 15, Ex. 10.) Plaintiffs also note that Northshore has been

1 awarded additional work on the East Link Project that requires metal roofing work (*see*  
2 *id.* ¶ 19), which suggests that Plaintiffs’ objections to Northshore’s interpretation of the  
3 Directive and PLA may have continued relevance to the East Link Project. The court  
4 concludes that this evidence is sufficient to establish a live case or controversy over  
5 whether Northshore is in compliance with the Directive.

6 As a result of Plaintiffs’ claim that Northshore is not complying with the  
7 Directive, this case is distinguishable from the case Northshore primarily relies on,  
8 *Derwin v. General Dynamics Corp.*, 719 F.2d 484 (1st Cir. 1983). In *Derwin*, the First  
9 Circuit noted that the union seeking to enforce an arbitration award “d[id] not allege that  
10 the company ha[d] repudiated or violated the award in some particular [*sic*] calling for  
11 judicial resolution” and did not seek “specific enforcement” of the award. *See id.* at 490.  
12 Accordingly, the court dismissed the union’s attempt to confirm the award because the  
13 court was “simply being asked to put its imprimatur upon an arbitral award in a  
14 vacuum.”<sup>3</sup> *See id.* at 491. Here, however, Plaintiffs claim that Northshore is not in  
15 compliance with the Directive and ask the court to order Northshore to comply with the  
16 directive going forward. (*See* Pet. at 2 ¶ 2; *id.* at 7 ¶ 1.) Thus, this case presents specific

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17 <sup>3</sup> Northshore does not identify any Ninth Circuit cases that adopt *Derwin*’s holding that  
18 courts cannot confirm arbitration awards under the LMRA absent a concrete dispute over the  
19 award’s application. (*See generally* Mot.) Moreover, *Derwin*’s rationale has not been  
20 universally adopted in other circuits. *See, e.g., Nat’l Football League Players Ass’n v. Nat’l*  
21 *Football League Mgmt. Council*, No. 08 CIV. 3658PAC, 2009 WL 855946, at \*3 (S.D.N.Y.  
22 Mar. 26, 2009) (“The law in the Second Circuit is that § 301 may be invoked to confirm labor  
arbitration awards regardless of whether the parties have complied with the award enforcement  
granted[.]”). Regardless, because *Derwin* is factually distinguishable from this case, the court  
need not determine whether a party seeking to confirm an arbitration award under the LMRA  
must identify an ongoing dispute over the award in order to sustain a cause of action in federal  
court.

1 allegations of an ongoing dispute over an arbitration award that the parties failed to  
2 present in *Derwin*. See *Derwin*, 719 F.2d at 490-91.

3 The court recognizes that Northshore submitted evidence and argument to try to  
4 refute Plaintiffs' allegation that Northshore has refused to comply with the Directive.  
5 (See generally MTD at 18-20; MTD Reply at 2-3, 4-10; Meyer Decl.; Hilgenfeld Decl.  
6 (Dkt. # 23); Elbert Decl. (Dkt. # 24).<sup>4</sup>) But a motion to dismiss for lack of subject matter  
7 jurisdiction is not the appropriate procedural vehicle for the court to resolve factual  
8 disputes on the merits of Plaintiffs' claim to enforce the Directive. See *Meyer*, 373 F.3d  
9 at 1039 ("[A] [j]urisdictional finding of genuinely disputed facts is inappropriate when  
10 the jurisdictional issue and substantive issues are so intertwined that the question of  
11 jurisdiction is dependent on the resolution of factual issues going to the merits of an  
12 action." (quoting *Sun Valley Gas, Inc. v. Ernst Enters.*, 711 F.2d 138, 139 (9th Cir.  
13 1983))). The gravamen of Plaintiffs' claim to enforce the Administrator's Directive is  
14 Plaintiffs' allegation that Northshore has not complied with the Directive and must be  
15 ordered to do so going forward. (See, e.g., Pet. at 2 ¶ 2, 7 ¶ 2.) If Northshore proves that  
16 it is already in compliance with the Directive, then this case would be more analogous to

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18 <sup>4</sup> In its motion to amend the petition, Plaintiffs take issue with the "new" evidence that  
19 Northshore submitted in Mr. Elbert's declaration because Northshore filed that evidence with its  
20 reply. (See MTA at 2-3.) Although "[i]t is not acceptable legal practice to present new evidence  
21 or new argument in a reply brief," *Roth v. BASF Corp.*, C07-0106MJP, 2008 WL 2148803, at \*3  
22 (W.D. Wash. May 21, 2008), parties may present additional evidence in support of a reply brief,  
where "[t]he [r]epley [b]rief addressed the same set of facts supplied in [a party's] opposition to  
the motion but provides the full context to [the party's] recitation of the facts," *Terrell v. Contra  
Costa Cty.*, 232 F. App'x 626, 629 n.2 (9th Cir. 2007). The court will not determine whether the  
evidence in Mr. Elbert's declaration is "new" evidence that should be ignored or stricken  
because that declaration would not change the court's conclusion that Plaintiffs have established  
a case or controversy.

1 *Derwin* and the court would have to determine whether it has jurisdiction to confirm an  
2 arbitration award that Northshore does not contest and has not violated. But that result  
3 assumes that Plaintiffs are, in fact, wrong on an issue that relates to the merits of this  
4 action, and a motion to dismiss for lack of subject matter jurisdiction is not the  
5 appropriate forum to resolve the dispute between Plaintiffs and Northshore on that issue.  
6 *See Meyer*, 373 F.3d at 1040 (“The district court erred in characterizing its dismissal of  
7 Safe Air’s complaint under Rule 12(b)(1) because the jurisdictional issue and substantive  
8 issues in this case are so intertwined that the question of jurisdiction is dependent on the  
9 resolution of factual issues going to the merits.”).

10 In sum, the court rejects Northshore’s facial and factual challenges to this court’s  
11 subject matter jurisdiction. Plaintiffs have established a live case or controversy over  
12 whether Northshore is complying with the Directive. As such, the court DENIES  
13 Northshore’s motion to dismiss.

#### 14 **B. Plaintiffs’ Motion to Amend**

15 Plaintiffs’ motion to amend seeks leave to amend the petition to add additional  
16 facts regarding the parties’ dispute over Northshore’s compliance with the Directive.  
17 (*See* MTA at 2, 4; *see also id.*, Ex. B (“Prop. Am. Pet.”).) When the court’s deadline for  
18 filing amended pleadings has not passed, the proper standard for considering a motion to  
19 amend a complaint is provided by Federal Rule of Civil Procedure 15(a). *See Johnson v.*  
20 *Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992)). Rule 15(a)(2)  
21 provides that “[t]he court should freely give leave [to amend] when justice so requires.”  
22 Fed. R. Civ. P. 15(a)(2). Generally, courts deny leave to amend “due to ‘undue delay,

1 bad faith or dilatory motive on the part of the movant, repeated failure to cure  
2 deficiencies by amendments previously allowed, undue prejudice to the opposing party  
3 by virtue of allowance of the amendment, [and] futility of amendment.’” *Leadsinger,*  
4 *Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371  
5 U.S. 178, 182 (1962)).

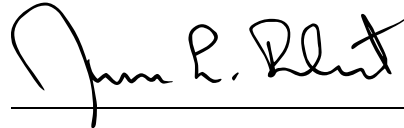
6 Under this liberal standard, the court concludes that Plaintiffs are entitled leave to  
7 amend. Plaintiffs have not previously amended the petition, Northshore’s opposition  
8 does not argue that Plaintiffs are acting in bad faith, and the scope of Plaintiffs’ proposed  
9 amendment is minimal. (*See generally* MTA Resp.; Dkt.; Prop. Am. Pet.) Plaintiffs also  
10 sought leave to amend only two weeks after Northshore filed its reply brief in support of  
11 the motion to dismiss, which Plaintiffs claimed raised new arguments that gave rise to the  
12 need to add additional facts. (*See* MTA at 3-5.) Thus, amendment is timely and will not  
13 prejudice Northshore. Indeed, Northshore’s only argument in opposition to the proposed  
14 amendment is that amendment is futile because Plaintiffs’ amended petition still fails to  
15 allege a case or controversy. (*See* MTA Resp. at 2.) The court resolved that issue in  
16 Plaintiffs’ favor on the operative petition. *See supra* § III.A.2. Thus, Plaintiffs’ proposed  
17 amendment is not necessary to defeat Northshore’s motion to dismiss. Nevertheless,  
18 Plaintiffs moved for leave to amend, and the court concludes that leave is warranted  
19 under Rule 15(a)(2). Accordingly, the court GRANTS Plaintiffs’ motion to amend.

#### 20 IV. CONCLUSION

21 For the reasons set forth above, the court DENIES Northshore’s motion to dismiss  
22 (Dkt. # 13) and GRANTS Plaintiffs’ motion for leave to amend the petition (Dkt. # 25).

1 The court ORDERS Plaintiffs to file their first amended petition (*see* Dkt. # 25, Ex. B) on  
2 the court's electronic docket within seven (7) days of the filing date of this order.

3 Dated this 28th day of February, 2020.

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6 JAMES L. ROBART  
7 United States District Judge  
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